

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

KHAMISI BRANCH,

Defendant and Appellant.

B211433

(Los Angeles County
Super. Ct. No. MA041965)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Carol C. Koppel, Judge. Affirmed as modified.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Khamisi Branch of resisting an executive officer, and the trial court found that Branch had one prior strike conviction, and four prior convictions for which he served a prison term. The trial court thereafter sentenced Branch to an aggregate term of 10 years in state prison, comprised of a high-term of three years, doubled to a six-year term for the prior strike, plus four terms of one year each for the four remaining prior convictions. Branch appeals. We find Branch should have been sentenced for three, not four, prior convictions with a prison term, and thus modify Branch's sentence to nine years. As modified, we affirm the judgment.

FACTS

On April 23, 2008, Los Angeles Sheriff's Department Deputies Jeffrey Williams and David Keese were in a marked black-and-white patrol car when they received a radio call from other officers in an unmarked vehicle who reported that they had seen a man running in the area, carrying a woman's purse. Deputy Keese drove to the location, where Deputy Williams saw Branch, carrying a purse, and "running and walking on and off . . . , nervously looking around." Deputy Keese drove after and up next to Branch, and Deputy Williams yelled for him to stop. Branch continued running through a parking area, around a building, and then down an alley, where the deputies were able to pull in front of him, blocking his path.

As Deputy Williams was exiting the patrol car, Branch put his hand with the purse behind his right side, out of the officer's sight. Deputy Williams began to walk toward Branch, telling him twice to show his hands. Instead, Branch swung the purse at Deputy Williams, grazing the officer's face. At that point, Deputy Williams grabbed Branch's arm, pulled him to the ground, and tried to secure his hands. Branch resisted, keeping his hands under his body, and a struggle ensued. Meanwhile, Deputy Keese had seen Branch take a "punch" at Deputy Williams, and joined his partner's struggle with Branch. During the struggle, Deputy Williams punched Branch in the head in an attempt to "distract" him.¹ Eventually, Deputies Williams and Keese were able to handcuff Branch.

¹ Deputy Williams broke his hand when he punched Branch.

Deputy Lance Jordan, who had made the original radio call, and who had then followed after the other deputies, assisted in subduing Branch in the alley.

In May 2008, the People filed an information charging Branch with one count of resisting an executive officer. At a jury trial in August and September 2008, the People presented evidence — testimony from the three arresting officers — establishing the facts summarized above. Branch called two civilian witnesses in his defense. Stephen Tucker testified that he had witnessed the events in the alley, that he did not see Branch swing at any officer, and that the officers used “moderate force” to take Branch to the ground. Richard Alcala testified that he had witnessed an arrest by sheriff’s deputies (in October 2007), but could not remember any of the officers’ names.

On September 3, 2008, the jury returned a verdict finding Branch guilty as charged. On September 24, 2008, the trial court sentenced Branch as noted at the outset of this opinion.

DISCUSSION

I. The Prosecutorial Misconduct Claim is Forfeited and Lacks Merit

Branch contends his conviction must be reversed because the prosecutor engaged in misconduct by violating the trial court’s pretrial in limine ruling to exclude evidence that Branch purportedly had been involved in an act of domestic violence against his wife immediately prior to running into the street with a purse. We disagree.

A. The Setting

Before trial, Branch’s counsel advised the court that the officers’ arrest report indicated that Branch may have “choked” his wife immediately before he was observed running down the street with a purse (presumably his wife’s), and expressed his concern that the police witnesses might testify that domestic violence precipitated the events on the day of his arrest. The prosecutor acceded that evidence of domestic violence was not needed to prove the People’s case because it did not really matter why Branch had been carrying the purse, only that he had resisted the officers after he stopped running. The trial court ruled that evidence of domestic violence would not be admitted. Later, at the ensuing trial, the following exchange occurred during Deputy Keese’s direct testimony:

“[THE PROSECUTOR]: So, actually, all that you’re certain about is that the punch was thrown?

“[DEPUTY KEESE]: Yes, sir.

“[THE PROSECUTOR]: Okay. And you didn’t see whether or not it landed on your partner at that point, did you?

“[DEPUTY KEESE]: No . . . ; I wasn’t sure if he actually was struck.

“[¶] . . . [¶]

“[THE PROSECUTOR]: Are you worried about anything?

“[DEPUTY KEESE]: Absolutely.

“[THE PROSECUTOR]: What are you worried about?

“[DEPUTY KEESE]: Whether my partner was hit, if there was any other weapon involved; and at least placing handcuff’s on Mr. Branch as quick as possible so the situation’s safe.

“[¶] . . . [¶]

“[THE PROSECUTOR]: Why do you want to put handcuffs on as soon as possible?

“[DEPUTY KEESE]: So it’ll be safe for all parties involved.

“[THE PROSECUTOR]: . . . Was your goal anytime during this incident to have an altercation with the defendant?

“[DEPUTY KEESE]: During this incident my goal was to stop him to determine if a crime occurred. When he began to [flee], in my mind I believed even more strongly that a crime was occurring because it’s not normal for someone who is innocent to run.

“[THE PROSECUTOR]: If, ideally, if the defendant when you pulled up in your car, if the defendant had just stopped and not done anything, [there] wouldn’t even have been an incident?

“[DEPUTY KEESE]: *At most from what I can remember potentially a domestic violence issue.* (Italics added.)

“[THE PROSECUTOR]: Actually now, let me, let me approach real quick.

“(Counsel both approached to her Honor and spoke off-record)

“[THE PROSECUTOR]: So now you approach him, and all of a sudden you come around the car, and then can you see, can you see the defendant and . . . Detective Williams?

“[DEPUTY KEESE]: I may have lost sight at a certain point in time, yes.

“[THE PROSECUTOR]: But when you come around . . . the rear portion of the car, then you gain visual again?

“[DEPUTY KEESE]: Yes, sir.

“[THE PROSECUTOR]: And what do you do?

“[DEPUTY KEESE]: I try to take control over the right side of Mr. Branch’s body. . . .”

The remainder of Deputy Keese’s direct examination covers five pages of the reporter’s transcript. Deputy Keese then testified on cross-examination (seven pages), and redirect (one page), and was excused by the trial court near the end of that day’s trial session. After Deputy Keese stepped down, the court ordered the jurors to return the following court day (Friday), and the following exchange occurred:

“[DEFENSE COUNSEL]: . . . I just wanted to . . . call attention to Deputy Keese testified in front of the jury something to the effect of well, there may have been a domestic violence issue, or something he was alluding to. And he did say that phrase domestic violence. [¶] Previously, I had brought this up in 402 motions and had asked that [the prosecutor] warn his witnesses about not mentioning certain items including this item. I believe that the jury may be speculating as to whether Mr. Branch was possibly involved in domestic violence; and [this] is certainly something that is a touchy issue, as well it should be. And I think they may be speculating right now what that was all about. [¶] I’d ask to strike Deputy Keese’s testimony.

“[THE COURT]: That motion is under consideration and the answer is the court denies the motion.

“[DEFENSE COUNSEL]: . . . I’ll ask the court to just caution in the abundance of caution for appellate reasons for just perhaps when the jury comes up on Tuesday, your Honor, can they have — give them the standard admonition that only evidence is to be considered, nothing else is to be considered; you may not speculate about anything that is not evidence; just the standard instruction, what it is . . . [¶] . . . I’ll try to have it tomorrow for you. “[THE COURT]: I don’t want you to work on these now. You’ll have the whole weekend.”

B. Branch’s Prosecutorial Misconduct Claim Is Forfeited on Appeal

Before we may address the merits of Branch’s claim of prosecutorial misconduct, we must consider the People’s contention that any such claim should be deemed forfeited on appeal because Branch did not object during Deputy Keese’s testimony at trial. We agree with the People’s forfeiture argument.

A defendant may not raise a claim of prosecutorial misconduct on appeal unless he or she interposed a timely objection on that ground at trial, and requested that the trial court admonish the jury to disregard the impropriety. (See, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 553.) A defendant may be excused from this prerequisite to a claim of misconduct on appeal only where the record persuades that such an objection would have been futile. (*Ibid.*) In the case before us today, the record suggests that Branch’s trial counsel made a tactical decision not to object until after Deputy Keese finished testifying, at which point counsel requested that the deputy’s testimony be stricken in its entirety. In addition, the defense objection cited an evidentiary violation of a pretrial ruling, not that the prosecutor had engaged in misconduct. We agree that, under these circumstances, any claim of prosecutorial misconduct was forfeited.

C. Branch’s Prosecutorial Misconduct Claim Lacks Merit

Assuming that Branch’s claim of prosecutorial misconduct is not waived, we find no merit to his arguments that his conviction must be reversed for such misconduct. The record does not support a conclusion that misconduct occurred and does not support a conclusion that, assuming misconduct occurred, it was prejudicial.

Prosecutorial misconduct occurs when deceptive or reprehensible methods are used to persuade a jury. (*People v. Valdez* (2004) 32 Cal.4th 73, 122.) When a reviewing court is tasked with determining whether such methods were employed, the defendant need not show bad faith on the part of the prosecutor because a defendant is injured by an improper trial tactic, regardless of whether it has occurred inadvertently or intentionally. (*People v. Hill* (1998) 17 Cal.4th 800, 823.) Where prosecutorial misconduct so infected a trial with unfairness as to make the defendant's resulting conviction a denial of due process, the misconduct will constitute an error of constitutional magnitude. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Where the misconduct merely exposes jurors to some improper factual matter, the error is tested under the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Frye* (1998) 18 Cal.4th 894, 976.)

1. No Prosecutorial Misconduct Occurred

A prosecutor's questions do not amount to misconduct unless the record shows that the prosecutor anticipated the witness's answers and purposefully asked the questions to elicit inadmissible testimony. (*People v. Pinholster* (1992) 1 Cal.4th 865, 943.) The record of Branch's trial does not show such a purposeful attempt to elicit inadmissible evidence. In context, the prosecutor's question was plainly designed to elicit Deputy Keese's expert opinion that Branch would not have unlawfully resisted had he simply complied with the officers' directions after he stopped running. The trial record further suggests that Deputy Keese's answer surprised the prosecutor, who immediately asked to speak at the sidebar. The matter was then dropped. We are satisfied that the prosecutor's question, and Deputy Keese's isolated answer on a tangential matter, did not constitute prosecutorial misconduct. It was neither deceptive nor reprehensible.

2. There was No Prejudice

Assuming that the prosecutor's hypothetical question was coupled with a failure to advise Deputy Keese properly before his testimony, and that this amounted to misconduct in that sense that it resulted in a wrongful trial presentation, we are not persuaded by his arguments that conviction must be reversed. The record does not, in our view, support a

suggestion that Branch's case was tipped in favor of the People by the prosecutor's single hypothetical question and Deputy Keese's passing "domestic violence" answer. And, again, we note that, immediately after the deputy's answer, the prosecutor himself asked for a sidebar conference (not reported), suggesting that he himself was surprised by the deputy's answer. The matter was not pursued further when the prosecutor's questioning resumed, and it was not alluded to at any subsequent time during trial as far as we can tell. Given the state of the record, we simply feel unable to accept that the one-time, passing reference to "potential domestic violence" rendered Branch's trial fundamental, unfair, or that it in any way affected the outcome of his trial from an evidentiary standpoint.

II. A Unanimity Instruction Was Not Required

Branch contends his conviction must be reversed because the trial court did not instruct the jury *sua sponte* with a unanimity instruction. We disagree.

When the evidence suggests more than one discrete crime occurred, one or two avenues at trial must be followed: either (1) the prosecution must elect among the crimes, or (2) the trial court must instruct the jurors that they are required to agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) A prosecutor makes such an election as to a particular theory of the case when he or she "clearly informs the jury" about that choice. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.)

Branch argues the evidence suggested he had engaged in two discrete crimes after he had stopped running — first, swinging the purse, and, second, struggling after he was on the ground. Assuming Branch is correct, there was no error because the prosecutor stated on more than one occasion that the case came down to whether or not Branch had taken a swing with the purse at Detective Williams. As the prosecutor explained, the officers were reasonably justified in detaining Branch to conduct an investigation, and Branch committed his offense at the moment he took a swing or punch at the officers with the purse. Or, more succinctly: "When I first stood up here with my opening, I told you . . . that we really wouldn't be here if [Mr. Branch] just had shown . . . his hands and not done anything. . . ." The acts which ensued were no more than a continuation of a

course of conduct resisting the officers in the performance of their lawful duty, which did not require a unanimity instruction. (*People v. Maury* (2003) 30 Cal.4th 342, 423.) Branch's acts were not fragmented as to time or space. (*People v. Diedrich* (1982) 31 Cal.3d 263, 282.)

Finally, assuming a unanimity instruction should have been given, the error was harmless under either a federal constitutional test or state law test. (Compare *Chapman v. California* (1967) 386 U.S. 18, 24 with *People v. Watson, supra*, 46 Cal.2d at p. 836.) From a common sense perspective, Branch's case came down to a single question: did he or did he not submit to the officers' directives after he stopped running? Whether Branch swung the purse and/or struggled with the officers when he was on the ground, were not, in our view, a series of discrete acts showing two separate, divisible crimes upon which the jury could have disagreed. We have no doubt that the jury unanimously agreed that Branch had obstructed the officers in the performance of their duties under any standard of review.

III. The Trial Court Did Not Abuse It's Discretion When It Denied Branch's Request to Re-Open The Direct Examination of Richard Alcala

Branch contends his conviction must be reversed because the trial court abused its discretion when it refused his defense counsel's request to reopen direct examination of defense witness Richard Alcala. We disagree.

A. The Setting

As noted above, Mr. Alcala testified that he saw his neighbor arrested by sheriff's deputies in October 2007, but could not remember the officers' names. Branch's trial counsel attempted to refresh Alcala's recollection with a written statement which Alcala had given to Branch's investigator, but Alcala still insisted that he really did not remember the name of the officer who had arrested his neighbor. An instant later, the defense rested. The trial court then excused Mr. Alcala, and advised the jurors to "take a 10-minute break." During the course of an ensuing discussion regarding jury instructions, Branch's trial counsel asked to re-open his direct examination of Alcala, stating that he (i.e., counsel) had "come into possession of an arrest report" from the

October 2007 event about which Alcala had been called to testify, and that he (i.e., counsel) “believe[d]” the report might refresh Alcala’s memory “as to the name of the deputy he saw . . . use excessive force” toward his neighbor. When the trial court inquired what the report might show to refresh Alcala’s memory, Branch’s counsel replied that it showed that Deputy Williams had arrested Alcala’s neighbor during the October 2007 event. The trial court denied the request to re-open the defense case, stating that it did not think it was “going to make any different [*sic*] in this case.”

B. Analysis

The trial court’s decision to allow a witness to be recalled is a matter within the court’s discretion, and the court’s decision is reviewed for abuse of discretion. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1520.) Based on the record before us, we decline to find the trial court’s decision was unreasonable. First, Alcala had already been excused, and the record does not show that he even remained available. Second, there is no sign in the record that Alcala would, in fact, have given testimony favorable to Branch, i.e., the record does not show that Alcala would have accused Deputy Williams of having used excessive force during the October 2007 arrest of Alcala’s neighbor. Finally, we reject Branch’s contention that the court’s decision to deny his counsel the opportunity to re-open direct examination of Alcala effectively denied Branch his chosen defense. Apart from Alcala, Branch presented testimony from civilian witness Stephen Tucker to the effect that Branch had not taken a punch at any officer prior to the point in time that he was wrestled to the ground. In the final analysis, we are not persuaded that the addition of Alcala’s testimony about a different event on a different day would have overcome the consistent testimony of three sheriff’s deputies.

IV. The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Dismiss

Branch contends his sentence must be vacated because the trial court abused its discretion when it denied his motion to dismiss the strike allegation.² (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) We disagree.

In considering a defendant's motion to dismiss a strike, the trial court's task is to determine whether the defendant "may be deemed outside the scheme's spirit, in whole or in part," and, for that reason, "treated as though he had not previously been convicted of [a strike]." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) In undertaking this task, the court must consider the nature and circumstances of the present offenses and the prior strikes, and the particulars of the defendant's background, character, and prospects. (*Ibid.*) The trial court's determination is reviewed for abuse of discretion. (*Id.* at p. 162.)

Although the trial court did not thoroughly verbalize an explanation of its reasons for its decision to deny Branch's *Romero* motion (see footnote 2, *ante*), the record amply supports its decision.

As the People have noted in their respondent's brief, Branch has a lengthy and significant criminal history which includes juvenile adjudications for taking a vehicle and assault on a school employee, and adult convictions for robbery, receiving stolen property, burglary, and vehicle theft. In February 2008, Branch was released from state prison on parole. In April 2008, he was arrested. On April 15, 2008, he was released. On April 23, 2008, he committed his current offense. Given Branch's criminal background, and the nature of his current offense — in which he essentially started a fight with police officers — we cannot say that Branch is "outside the spirit" of the three

² The trial court's discussion of Branch's *Romero* motion at the time of the sentencing hearing provides us with the following insight into the court's reasons for denying the motion: "The court has read and reviewed the motion under *People v. Romero*. Court denies the motion." The court's minute order from the sentencing hearing indicates that it imposed a high-term sentence and denied *Romero* relief, "[b]ased on the 6 factors in aggravation" cited in the probation report. Those cited factors included Branch's recidivism.

strikes law. As a result, we are not persuaded by Branch's arguments on appeal to find that the court abused its discretion in denying the motion.

V. The Sentence is Not Cruel and Unusual

Branch contends his sentence must be vacated because it constitutes a cruel and unusual "disproportionate" punishment under the Eighth Amendment of the United States Constitution. We disagree.

The determination of the appropriate length of a punishment for a given offense in given circumstances is a legislative prerogative, and, for this reason, a penalty will not be found to violate the Eighth Amendment's proscription against cruel and unusual punishment unless it is so disproportionate to the offense for which it is imposed that it "shocks the conscience." (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 962-964.) A state's sentencing scheme which doubles the prescribed penalty for resisting a police officer, raising the term of imprisonment from three years to six years based upon a defendant's prior strike conviction, does not come close to shocking our conscience. Branch's current sentencing circumstances simply are not similar to a defendant who was sentenced to a term of 28 years to life for failing to fill out registration documents required under the sex offender statutes. (See, e.g., *Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875.)

VI. The Sentence Must be Modified to Reflect Three Prior Convictions

Branch contends, the People concede, and we agree that his sentence must be modified to reflect three, not four, prior convictions for which he served prison terms. Branch was sentenced on two of his prior convictions on the same date, and, thus, by statutory definition, those two convictions are counted as only one conviction for which he served a prison term. Branch's sentence should total nine years, not 10 years.

VII. The Trial Court Properly Ruled on the In-Camera Inspection of the Police Officer's Records

In accord with *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232, Branch has asked our court to review independently the sealed reporter's transcript of the in camera hearing at which the trial court examined the arresting officers' personnel records in

response to his *Pitchess* motion. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) We have done so, and find that the trial court satisfied its judicial oversight duties, and that there exist no relevant materials — beyond those which were ordered disclosed by the trial court — which should have been disclosed. The trial court reviewed the records brought to the in camera proceeding by the custodian of records, if any, and carefully and expressly synopsisized the records which it reviewed, if any, and stated its analysis and reasons for ordering disclosure or nondisclosure, as the case may have been, of any and all relevant records.

DISPOSITION

Branch's sentence is modified to reflect three, not four, prior convictions for which he served a prison term, and, as modified, the judgment is affirmed. The trial court is directed to issue a new abstract of judgment reflecting the proper sentence, and to forward the corrected abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

FLIER, Acting P. J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.